

No. 12864

United States
Court of Appeals
For the Ninth Circuit.

C B S STEEL AND FORGE COMPANY, a
Corporation,

Appellant,

vs.

GORDON W. SHULTZ, ERNEST PUETZ, LEE
McCOY, HOWARD LANE and HAROLD W.
GENTIS,

Appellees.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

RICHARD A. PERKINS,
608 South Hill St., Suite 1010,
Los Angeles 14, Calif.

For Appellees Shultz and Puetz:

LYLE W. RUCKER,
5410 Wilshire Blvd.,
Los Angeles 36, Calif.

For Appellee McCoy:

EDMUND I. READ,
742 Broad Avenue,
Wilmington, Calif.

For Appellees Lane and Gentis:

HERBERT R. LANDE,
413 West Seventh St.,
San Pedro, Calif.

In the District Court of the United States, Southern
District of California, Central Division

No. Civil 9763-PH

HOWARD LANE and HAROLD W. GENTIS,
Plaintiffs,

vs.

C. B. S. STEEL & FORGE COMPANY, a Cor-
poration; JOHN DOE; and JOHN DOE COM-
PANY, a Partnership.

Defendants.

COMPLAINT UNDER FAIR LABOR
STANDARD ACT OF 1938

Comes now the plaintiff, Howard Lane, and for
cause of action alleges:

I.

That the defendants are, and at all times men-
tioned herein were engaged in interstate commerce
and in the production of goods for interstate com-
merce by the production in the City of Los An-
geles, State of California, of steel forgings for use
in aeroplane and oil field equipment, which steel
forgings were used and sent in interstate commerce.

II.

That from on or about October 1, 1948, said
plaintiff was employed by the defendants in inter-
state commerce and in the production of goods for
interstate commerce as a blacksmith's helper [2*]

*Page numbering appearing at foot of page of original Certified
Transcript of Record.

and maintenance repairman at defendants' forge shop, being employed in the production of said steel forgings and the maintenance and repair of machines engaged in the production of said steel forgings.

III.

That during the time and while employed by the defendants as alleged hereinabove, the defendants employed said plaintiff for work weeks longer than 40 hours per week without paying said plaintiff compensation for the hours of his said employment in excess of 40 hours per week at the rate of one and one-half times the regular rate at which he was employed; that from on or about March 1, 1948, to on or about May 27, 1948, said plaintiff worked 28 hours overtime for which he was not so compensated; that said plaintiff does not know the exact hours per week during said time for which he was not so compensated, but that said information is within the knowledge of the defendants; that during said time plaintiff's regular rate of pay was \$1.50 per hour; that on or about May 24, 1948, plaintiff's compensation and regular rate of pay was changed to a monthly salary of \$350.00 for a 40 hour work week; that the regular hourly rate of pay thereupon became \$2.01 per hour; that from May 24, 1948, to and including September 29, 1948, plaintiff worked a total of $454\frac{3}{4}$ hours in excess of 40 hours per week during said period; that there is due and owing and unpaid from the defendants to the plaintiff as unpaid overtime compensation as aforesaid, the sum of \$1,434.07; that plaintiff has

demanded payment of the same from the defendants, and defendants have refused to pay the same, or any part thereof.

IV.

That there is due said plaintiff from the defendants the additional sum of \$1,434.07 as liquidated damages to said plaintiff by reason of the violation of the Fair Labor Standards Act as hereinabove alleged.

V.

That \$1,000.00 is a reasonable and fair attorney's fee for [3] plaintiff's attorney for his service to plaintiff rendered herein to be paid by the defendants.

For a Second Cause of Action, the plaintiff Harold W. Gentis alleges as follows:

I.

Plaintiff refers to and incorporates herein the allegations contained in Paragraph I of the First Cause of Action.

II.

That from on or about April 1, 1948, to on or about October 13, 1948, said plaintiff was employed by the defendants in interstate commerce and in the production of goods for interstate commerce as a maintenance repairman at defendants' forge shop to maintain and repair the machines and equipment used by the defendants in the aforesaid construction and making of said steel forgings.

III.

That during the time and while employed by the defendants, as alleged hereinabove, the said defendants employed the plaintiff for work weeks longer than 40 hours per week without paying the plaintiff compensation for the hours of his said employment in excess of 40 hours per week at the rate of one and one-half times the regular rate at which he was employed; that from April 1, 1948, to May 31, 1948, plaintiff worked 30 hours in excess of the said 40 hours per week; that the exact weeks during which plaintiff worked said additional hours are not known to plaintiff, but is known to the defendants; that from May 14, 1948, to and including October 13, 1948, plaintiff worked 620 hours over 40 hours per week during said time; that during the aforesaid time plaintiff was employed at the rate of \$450.00 per month for a 40 hour work week; that plaintiff's regular rate of pay was \$2.60 per hour; that there is due and owing and unpaid from the defendant to the plaintiff as unpaid overtime compensation [4] as aforesaid, the sum of \$2,557.60; that plaintiff has demanded payment of the same from the defendants, and defendants have refused to pay the same, or any part thereof.

IV.

That there is due plaintiff from the defendants the additional sum of \$2,557.60 as liquidated damages to said plaintiff by reason of the violation of the Fair Labor Standard Act as hereinabove alleged.

V.

That \$750.00 is a reasonable and fair attorney's fee for plaintiff's attorney for his services to plaintiff rendered herein to be paid by the defendants.

Wherefore, plaintiff Howard Lane prays for judgment against the defendants, and each of them, for the sum of \$3,868.14; and plaintiff Harold W. Gentis prays for judgment against the defendants, and each of them, for the sum of \$5,865.20; and for costs of suit herein.

/s/ HERBERT R. LANDE,
Attorney for Plaintiffs.

State of California,
County of Los Angeles—ss.

Howard Lane being duly sworn deposes and says: That he is one of the plaintiffs in the above-entitled action; that he has read the foregoing Complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters he believes it to be true.

/s/ HOWARD LANE.

Subscribed and sworn to before me this 25th day of May, 1949.

[Seal] /s/ GLADYS DOWNING,
Notary Public in and for
Said County and State.

[Endorsed]: Filed May 31, 1949. [5]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT
C B S STEEL AND FORGE

For answer to plaintiffs' First Cause of Action (that of plaintiff Howard Lane) defendant C B S Steel and Forge, a corporation, alleges:

First Defense

Plaintiffs' First Cause of Action fails to state a claim upon which relief can be granted against this defendant.

Second Defense

This defendant denies that it is or ever has been engaged in interstate commerce or in the production of goods for interstate commerce; admits that it is and has been engaged in the production of steel forgings, some of which are used in airplane and oil field equipment; alleges that it is without knowledge or information sufficient to form a belief as to whether any of said steel forgings has been used or sent in interstate commerce; and denies each and every other allegation contained in plaintiff's First Cause [6] of Action.

Third Defense

If this defendant ever failed to pay plaintiff Howard Lane promptly when due any amount of money owing said plaintiff under the Fair Labor Standards Act of 1938, as amended, any such amount was fully paid before the commencement of this action, together with an additional amount

more than sufficient to satisfy any obligation this defendant ever might have had to pay liquidated damages and attorney fees.

Fourth Defense

Plaintiff Howard Lane is estopped to assert any claim or demand against this defendant under the Fair Labor Standards Act of 1938, as amended, for the reason that while employed by this defendant said plaintiff agreed to work only 40 hours weekly and represented to this defendant that he worked only 40 hours weekly, and he concealed from this defendant until long after the termination of his employment that he had or claimed to have anything due him from this defendant. This defendant relied on said representations to its detriment by continuing his employment at high wages, by permitting him to work without close supervision, to loiter on its premises for his own personal convenience, and to enter and leave its premises freely, and by paying him severance pay at the termination of his employment.

Fifth Defense

If the activities for which plaintiff Howard Lane seeks to recover ever took place they were activities which were preliminary or postliminary to the principal activity or activities which said plaintiff was employed to perform and were either prior to the time on any particular work day at which said plaintiff commenced, or subsequent to the time on any work day at which he ceased, such principal

activities. There has never been any contract, custom, or practice in effect at the place where said plaintiff was employed whereby any of such preliminary or postliminary activities was compensable. By virtue of Section 4 of the Portal to Portal Act of 1947 this defendant is not subject to any liability or punishment on account of any failure to pay overtime compensation for or on account of any such activities. [7]

Sixth Defense

Any act or omission of this defendant which gave rise to this action on the part of plaintiff Howard Lane was in good faith and this defendant had reasonable grounds for believing that said act or admission was not a violation of the Fair Labor Standards Act of 1938, as amended, viz.: while employed by this defendant said plaintiff agreed to work only 40 hours weekly and represented to this defendant that he worked only 40 hours weekly; and he concealed from this defendant until long after the termination of his employment that he had or claimed to have anything due him from this defendant.

And for answer to plaintiff's Second Cause of Action (that of Harold W. Gentis) this defendant alleges:

First Defense

Plaintiffs' Second Cause of Action fails to state a claim upon which relief can be granted against this defendant.

Second Defense

This defendant denies that it is or ever has been engaged in interstate commerce or in the production of goods for interstate commerce; admits that it is and has been engaged in the production of steel forgings, some of which are used in airplane and oil field equipment; alleges that it is without knowledge or information sufficient to form a belief as to whether any of said steel forgings has been used or sent in interstate commerce; admits that from on or about April 1, 1948, to on or about October 13, 1948, said plaintiff was employed by this defendant; and denies each and every other allegation contained in plaintiffs' Second Cause of Action.

Third Defense

If this defendant ever failed to pay plaintiff Harold W. Gentis promptly when due any amount of money owing said plaintiff under the Fair Labor Standards Act of 1938, as amended, any such amount was fully paid before the commencement of this action, together with an additional amount more than sufficient to satisfy any obligation this defendant ever might have had to pay liquidated damages and attorney fees. [8]

Fourth Defense

Plaintiff Harold W. Gentis is estopped to assert any claim or demand against this defendant under the Fair Labor Standards Act of 1938, as amended, for the reason that while employed by this defendant said plaintiff agreed to work only 40 hours

weekly and represented to this defendant that he worked only 40 hours weekly, and he concealed from this defendant until long after the termination of his employment that he had or claimed to have anything due him from this defendant. This defendant relied on said representations to its detriment by continuing his employment at high wages by permitting him to work without close supervision, to loiter on its premises for his own personal convenience, and to enter and leave its premises freely, and by paying him severance pay at the termination of his employment.

Fifth Defense

If the activities for which plaintiff Harold W. Gentis seeks to recover ever took place they were activities which were preliminary or postliminary to the principal activity or activities which said plaintiff was employed to perform and were either prior to the time on any particular work day at which said plaintiff commenced, or subsequent to the time on any work day at which he ceased, such principal activities. There has never been any contract, custom, or practice in effect at the place where said plaintiff was employed whereby any of such preliminary or postliminary activities was compensable. By virtue of Section 4 of the Portal to Portal Act of 1947 this defendant is not subject to any liability or punishment on account of any failure to pay overtime compensation for or on account of any such activities.

Sixth Defense

Any act or omission of this defendant which gave rise to this action on the part of plaintiff Harold W. Gentis was in good faith and this defendant had reasonable grounds for believing that said act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, viz.: While employed by this defendant said plaintiff agreed to work only 40 hours weekly and represented to this defendant that he worked only 40 hours weekly, [9] and he concealed from this defendant until long after the termination of his employment that he had or claimed to have anything due him from this defendant.

Wherefore, this defendant prays that plaintiffs take nothing by their complaint and that this defendant recover its costs.

/s/ RICHARD A. PERKINS,
Attorney for Defendant
C B S Steel and Forge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 28, 1949. [10]

[Title of District Court and Cause.]

MOTION FOR LEAVE TO BRING IN
THIRD PARTIES DEFENDANT

Defendant C B S Steel and Forge moves for leave to make Gordon W. Shultz, Ernest Puetz, and

Lee McCoy parties to this action and that there be served upon them summons and third-party complaint as set forth in Exhibit A hereto attached.

/s/ RICHARD A. PERKINS,
Attorney for Defendant
C B S Steel and Forge. [15]

EXHIBIT A

In the United States District Court for the
Southern District of California, Central Division

Civil Action No. 9763—PH

HOWARD LANE and HAROLD W. GENTIS,
Plaintiffs,

vs.

C B S STEEL AND FORGE, a Corporation,
Defendant and Third-Party Plaintiff,

vs.

GORDON W. SHULTZ, ERNEST PUETZ and
LEE McCOY,

Third-Party Defendants.

SUMMONS

To the Above-Named Third-Party Defendants:

You are hereby summoned and required to serve upon Herbert R. Lande, Esquire, plaintiffs' attorney whose address is 413 West 7th Street, San Pedro, California, and upon Richard A. Perkins, Esquire, who is attorney for C B S Steel and

Forge, a corporation, defendant and third-party plaintiff, and whose address is 608 South Hill Street, Suite 1010, Los Angeles 14, California, an answer to the third-party complaint which is herewith served upon you and an answer to the complaint of the plaintiff, a copy of which is served upon you, within 20 days after the service of this summons upon you exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the third-party complaint.

Dated:

[Seal] EDMUND L. SMITH,
Clerk of Court. [16]

[Title of District Court and Cause.]

THIRD PARTY COMPLAINT

I.

Plaintiffs Howard Lane and Harold W. Gentis have filed against defendant C B S Steel and Forge, a corporation, designated by the name of C B S Steel and Forge Company, and certain fictitiously named defendants, a complaint, a copy of which is hereto attached.

II.

By said complaint said Howard Lane and Harold W. Gentis seek to recover over-time compensation, liquidated damages, and attorney fees from defendant C B S Steel and Forge upon the claim that

the same accrued to them from this defendant during their employment by this defendant from on or about April 1 to on or about November 1, 1948.

III.

Defendant C B S Steel and Forge has answered said complaint and denied that anything is due or owing to either said Howard Lane or said [17] Harold W. Gentis from defendant C B S Steel and Forge, but in view of the hazards and uncertainties of litigation it is remotely possible that either said Howard Lane or said Harold W. Gentis or both of them might recover judgment against defendant C B S Steel and Forge for some part of their claims.

IV.

If defendant C B S Steel and Forge is liable to said Howard Lane or said Harold W. Gentis in any amount whatever it is because of the negligence or other misconduct of Gordon W. Shultz, Ernest Puetz, and Lee McCoy, hereinafter collectively referred to as third parties defendant, all of whom were officers or agents of defendant C B S Steel and Forge during the period within which any such liability of defendant C B S Steel and Forge was incurred. During said period Gordon W. Shultz was president, Ernest Puetz was comptroller, and Lee McCoy was forge shop superintendent of defendant C B S Steel and Forge, and it was their duty to cause defendant C B S Steel and Forge to keep complete and accurate records of over-time

worked and to pay employees promptly when due any over-time compensation owing them.

Wherefore defendant C B S Steel and Forge demands judgment against third party defendants Gordon W. Shultz, Ernest Puetz, Lee McCoy, and each of them for all sums that may be adjudged against defendant C B S Steel and Forge in favor of plaintiffs Howard Lane and Harold W. Gentis.

/s/ RICHARD A. PERKINS,
Attorney for C B S Steel and Forge, Third Party
Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 8, 1950. [18]

[Title of District Court and Cause.]

ORDER GRANTING LEAVE TO DEFENDANT
C B S STEEL AND FORGE AS THIRD
PARTY PLAINTIFF TO BRING IN GOR-
DON W. SHULTZ, ERNEST PUETZ AND
LEE McCOY AS THIRD PARTIES DE-
FENDANT

The motion of defendant C B S Steel and Forge for leave to bring in Gordon W. Shultz, Ernest Puetz and Lee McCoy as third parties defendant to this action coming on regularly to be heard this 17th day of July, 1950, there being no opposition thereto, and the Court being fully advised in the premises, It Is Ordered that said motion be and the same hereby is granted, and that there be served upon said third parties defendant summons and third party complaint in the form of Exhibit A attached to the notice of said motion.

Dated: July 17, 1950.

/s/ PEIRSON M. HALL,

United States District Judge.

Approved as to Form:

/s/ HERBERT R. LANDE,

Attorney for Plaintiffs.

[Endorsed]: Filed July 24, 1950. [20]

In the United States District Court for the
Southern District of California, Central Division
Civil Action No. 9763—PH

HOWARD LANE and HAROLD W. GENTIS,
Plaintiffs,
vs.

C B S STEEL AND FORGE, a Corporation,
Defendant and Third Party Plaintiff,
vs.

GORDON W. SHULTZ, ERNEST PUETZ, and
LEE McCOY,
Third Parties Defendant.

THIRD PARTY COMPLAINT

I.

Plaintiffs Howard Lane and Harold W. Gentis have filed against defendant C B S Steel and Forge, a corporation, designated by the name of C B S Steel and Forge Company, and certain fictitiously named defendants, a complaint, a copy of which is hereto attached.

II.

By said complaint said Howard Lane and Harold W. Gentis seek to recover over-time compensation, liquidated damages, and attorney fees from defendant C B S Steel and Forge upon the claim that the same accrued to them from this defendant during

their employment by this defendant from on or about April 1 to on or about November 1, 1948.

III.

Defendant C B S Steel and Forge has answered said complaint and denied that anything is due or owing to either said Howard Lane or said [21] Harold W. Gentis from defendant C B S Steel and Forge, but in view of the hazards and uncertainties of litigation it is remotely possible that either said Howard Lane or said Harold W. Gentis or both of them might recover judgment against defendant C B S Steel and Forge for some part of their claims.

IV.

If defendant C B S Steel and Forge is liable to said Howard Lane or said Harold W. Gentis in any amount whatever it is because of the negligence or other misconduct of Gordon W. Shultz, Ernest Puetz, and Lee McCoy, hereinafter collectively referred to as third parties defendant, all of whom were officers or agents of defendant C B S Steel and Forge during the period within which any such liability of defendant C B S Steel and Forge was incurred. During said period Gordon W. Shultz was president, Ernest Puetz was comptroller, and Lee McCoy was forge shop superintendent of defendant C B S Steel and Forge, and it was their duty to cause defendant C B S Steel and Forge to keep complete and accurate records of over-time worked and to pay employees promptly when due any over-time compensation owing them.

Wherefore defendant C B S Steel and Forge demands judgment against third party defendants Gordon W. Shultz, Ernest Puetz, Lee McCoy, and each of them for all sums that may be adjudged against defendant C B S Steel and Forge in favor of plaintiffs Howard Lane and Harold W. Gentis.

/s/ RICHARD A. PERKINS,
Attorney for C B S Steel and Forge, Thirty Party
Plaintiffs. [22]

[Title of District Court and Cause.]

COMPLAINT UNDER FAIR LABOR
STANDARDS ACT OF 1938

Comes now the plaintiff, Howard Lane, and for cause of action alleges:

I.

That the defendants are, and at all times mentioned herein were engaged in interstate commerce and in the production of goods for interstate commerce by the production in the City of Los Angeles, State of California, of steel forgings for use in aeroplane and oil field equipment, which steel forgings were used and sent in interstate commerce.

II.

That from on or about October 1, 1948, said plaintiff was employed by the defendants in interstate commerce and in the production of goods for inter-

state commerce as a blacksmith's helper and [23] maintenance repairman at defendants' forge shop, being employed in the production of said steel forgings and the maintenance and repair of machines engaged in the production of said steel forgings.

III.

That during the time and while employed by the defendants as alleged hereinabove, the defendants employed said plaintiff for work weeks longer than 40 hours per week without paying said plaintiff compensation for the hours of his said employment in excess of 40 hours per week at the rate of one and one-half times the regular rate at which he was employed; that from on or about March 1, 1948, to on or about May 27, 1948, said plaintiff worked 28 hours overtime for which he was not so compensated; that said plaintiff does not know the exact hours per week during said time for which he was not so compensated, but that said information is within the knowledge of the defendants; that during said time plaintiff's regular rate of pay was \$1.50 per hour; that on or about May 24, 1948, plaintiff's compensation and regular rate of pay was changed to a monthly salary of \$350.00 for a 40 hour work week; that the regular hourly rate of pay thereupon became \$2.01 per hour; that from May 24, 1948, to and including September 29, 1948, plaintiff worked a total of 454 $\frac{3}{4}$ hours in excess of 40 hours per week during said period; that there is due and owing and unpaid from the defendants to the plaintiff as unpaid overtime compensation

as aforesaid, the sum of \$1,434.07; that plaintiff has demanded payment of the same from the defendants, and defendants have refused to pay the same, or any part thereof.

IV.

That there is due said plaintiff from the defendants the additional sum of \$1,434.07 as liquidated damages to said plaintiff by reason of the violation of the Fair Labor Standards Act as hereinabove alleged.

V.

That \$1,000.00 is a reasonable and fair attorney's fee for [24] plaintiff's attorney for his service to plaintiff rendered herein to be paid by the defendants.

For a Second Cause of Action, the plaintiff Howard W. Gentis alleges as follows:

I.

Plaintiff refers to and incorporates herein the allegations contained in Paragraph I of the First Cause of Action.

II.

That from on or about April 1, 1948, to on or about October 13, 1948, said plaintiff was employed by the defendants in interstate commerce and in the production of goods for interstate commerce as a maintenance repairman at defendants' forge shop to maintain and repair the machines and equipment used by the defendants in the aforesaid construction and making of said steel forgings.

III.

That during the time and while employed by the defendants, as alleged hereinabove, the said defendants employed the plaintiff for work weeks longer than 40 hours per week without paying the plaintiff compensation for the hours of his said employment in excess of 40 hours per week at the rate of one and one-half times the regular rate at which he was employed; that from April 1, 1948, to May 31, 1948, plaintiff worked 30 hours in excess of the said 40 hours per week; that the exact weeks during which plaintiff worked said additional hours are not known to plaintiff, but is known to the defendants; that from May 14, 1948, to and including October 13, 1948, plaintiff worked 620 hours over 40 hours per week during said time; that during the aforesaid time plaintiff was employed at the rate of \$450.00 per month for a 40 hour work week; that plaintiff's regular rate of pay was \$2.60 per hour; that there is due and owing and unpaid from the defendant to the plaintiff as unpaid overtime compensation [25] as aforesaid, the sum of \$2,557.60; that plaintiff has demanded payment of the same from the defendants, and defendants have refused to pay the same, or any part thereof.

IV.

That there is due plaintiff from the defendants the additional sum of \$2,557.60 as liquidated damages to said plaintiff by reason of the violation of the Fair Labor Standards Act as hereinabove alleged.

V.

That \$750.00 is a reasonable and fair attorney's fee for plaintiff's attorney for his service to plaintiff rendered herein to be paid by the defendants.

Wherefore, plaintiff Howard Lane prays for judgment against the defendants, and each of them, for the sum of \$3,868.14; and plaintiff Harold W. Gentis prays for judgment against the defendants, and each of them, for the sum of \$5,865.20; and for costs of suit herein.

/s/ HERBERT R. LANDE,
Attorney for Plaintiffs.

State of California,
County of Los Angeles—ss.

Howard Lane being duly sworn deposes and says: That he is one of the plaintiffs in the above-entitled action; that he has read the foregoing Complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters he believes it to be true.

/s/ HOWARD LANE.

Subscribed and sworn to before me this 25th day of May, 1949.

GLADYS DOWNING,
Notary Public in and for
Said County and State.

[Endorsed]: Filed July 24, 1950. [26]

[Title of District Court and Cause.]

CIVIL ACTION—NOTICE OF MOTION FOR
SUMMARY JUDGMENT UNDER RULE
12 (b) AND RULE 56b AND 56c

To the Plaintiff, by and Through Their Attorney
of Record, Herbert R. Lande, Esq.; and to
Third Party Plaintiff, by and Through Its At-
torney of Record, Richard A. Perkins, Esq.:

You, and Each of You, Will Please Take Notice,
that the Gordon W. Shultz and Ernest Puetz, Third
Parties Defendant, by and through their attorney
of record, Lyle W. Rucker, Esq., will move the
within-entitled court, before the Honorable Peirson
M. Hall, Judge Presiding, on September 18, 1950,
Monday, at the hour of 10 o'clock a.m. of said day,
or as soon thereafter as counsel can be heard, for
Summary Judgment, and failing in that respect,
for an Order to the effect that Third Party Com-
plaint fails to state a claim as against Third Parties
Defendant, upon which relief can be granted. [27]

Said Motion will be based upon the Complaint,
Third Party Complaint, and records and files of the
within-entitled action, on file in the within-entitled
matter.

/s/ LYLE W. RUCKER,

Attorney for Third Parties Defendant, Gordon W.
Shultz and Ernest Puetz.

Dated: August 14, 1950. [28]

[Title of District Court and Cause.]

CIVIL ACTION—MOTION UNDER FEDERAL
RULES SEC. 12 (b) AND RULE 56b AND
56c FOR DISMISSAL OF ACTION AND
FOR SUMMARY JUDGMENT

To the Honorable District Court of the United
States, for the Southern District of California,
Central Division:

The undersigned, Gordon W. Shultz and Ernest Puetz, Third Parties Defendant, do hereby move the above-entitled Court, the Honorable Peirson Hall, Judge Presiding, for an Order of said court, Dismissing Third Party Plaintiff's Third Party Complaint, and for Summary Judgment in favor of Third Parties Defendant, as against said Third Party Plaintiff on the following grounds, to wit: That the within-entitled Court is without jurisdiction over the Third Parties Defendant, Gordon W. Shultz and Ernest Puetz; That said Third Party Complaint fails to state a claim upon which relief can be granted as against said Third Party Defendant, and that, said Third Parties Defendant are entitled to Summary [29] Judgment as against said Third Party Plaintiff.

That said Motion is based upon the Complaint

and the Third Party Complaint on file herein, together with the records and files of the within action.

/s/ LYLE W. RUCKER,
Attorney for Third Parties Defendant, Gordon W.
Shultz and Ernest Puetz.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 17, 1950. [30]

[Title of District Court and Cause.]

NOTICE OF MOTION

To: C B S Steel and Forge, Defendant and Third
Party Plaintiff, and

To: Richard A. Perkins, Its Attorney:

You will please take notice that on the 18th day of September, 1950, at the hour of 10:00 a.m., at the courthouse in the Federal Building, in the City of Los Angeles, County of Los Angeles, State of California, in the Motion Department, the third party defendant, Lee McCoy will move this court for an order dismissing the third party complaint as to this third party defendant and for summary judgment in accordance with the motion on file herein, a copy of which is annexed hereto.

Said motion will be based on this notice and upon

all the pleadings, papers and proceedings heretofore had and on file [32] herein.

Dated this 18th day of August, 1950.

/s/ EDMUND I. READ,

Attorney for Third Party

Defendant, Lee McCoy. [33]

[Title of District Court and Cause.]

MOTION

To the Honorable District Court of the United States, for the Southern District of California, Central Division:

Comes now the third party defendant, Lee McCoy, and severing from all other defendants, appears by his attorney, Edmund I. Read, for the purpose of this motion only and moves this court for an order dismissing the third party complaint on file herein as to this defendant and for summary judgment on the ground that no claim has been set forth in said third party complaint whereby this defendant is liable, and for all proper relief.

/s/ EDMUND I. READ,

Attorney for Third Party

Defendant, Lee McCoy.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 22, 1950. [34]

[Title of District Court and Cause.]

ORDER DISMISSING THIRD PARTY
COMPLAINT

Third Parties Defendant's motions for an order decreeing that Third Party Plaintiff's complaint fails to state a claim upon which relief can be granted having come on for hearing before Honorable Peirson M. Hall, Judge Presiding, in Department 1 of the above-entitled court, on the 2nd day of October, 1950, Lyle W. Rucker, Esq., appearing as attorney for third parties defendant Gordon W. Shultz and Ernest Puetz; Edmund I. Read, Esq., appearing as attorney for third party defendant Lee McCoy, and Richard A. Perkins, Esq., appearing as attorney for third party plaintiff C B S Steel and Forge, a corporation, and argument having been made in support and in defense of said motion by counsel and the cause having been duly submitted to the Court for decision:

The Court thereupon made its Order dismissing said [37] third party complaint as against third parties defendants Gordon W. Shultz, Ernest Puetz and Lee McCoy.

Let Judgment be Entered Accordingly.

/s/ PEIRSON M. HALL,
Judge.

Dated: October 5th, 1950.

[Endorsed]: Filed October 5, 1950. [38]

In the United States District Court for the Southern
District of California, Central Division

Civil Action No. 9763—PH

HOWARD LANE and HAROLD W. GENTIS,
Plaintiffs,

vs.

C B S STEEL AND FORGE, a Corporation,
Defendant and Third Party Plaintiff,

vs.

GORDON W. SHULTZ, ERNEST PUETZ and
LEE McCOY,

Third Parties Defendant.

JUDGMENT OF DISMISSAL, THIRD
PARTY COMPLAINT

Third Parties Defendant's motions for an order decreeing that Third Party Plaintiff's complaint fails to state a claim upon which relief can be granted having come on for hearing before Honorable Peirson M. Hall, Judge Presiding, in Department 1 of the above-entitled Court, on the 2nd day of October, 1950; Lyle W. Rucker, Esq., appearing as attorney for third parties defendant Gordon W. Shultz and Ernest Puetz; Edmund I. Read, Esq., appearing as attorney for third party defendant Lee McCoy, and Richard A. Perkins, Esq., appearing as attorney for third party plaintiff C B S Steel and Forge, a corporation, and argument having

been made in support and in defense of said motion by counsel and the cause having been duly submitted to the Court and considered by it; and the court having made its Order Dismissing said [39] third party complaint and directing that Judgment be entered dismissing said third party complaint;

Now Therefore, it is hereby Ordered and Decreed that third party plaintiff's Third Party Complaint is hereby dismissed as against third parties defendant Gordon W. Shultz, Ernest Puetz and Lee McCoy.

/s/ PEIRSON M. HALL.

Dated: October 5th, 1950.

Dismissed October 6, 1950.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 5, 1950. [40]

[Title of District Court and Cause.]

NOTICE OF MOTION TO VACATE ORDER
DISMISSING THIRD PARTY COM-
PLAINT, ETC.

To Third Party Defendants and their Attorneys:

You and each of you will please take notice that the undersigned counsel for C B S Steel and Forge, defendant and third party plaintiff, will move the above-entitled Court in the courtroom of the Honorable Peirson M. Hall, on October 16, 1950, at 10:00

a.m., or as soon thereafter as counsel may be heard, for an order vacating the order of dismissal of the third party complaint, denying the motions directed by third party defendants against said third party complaint, and directing the third party defendants to answer the same. Said motion will be made upon the ground that the Court has jurisdiction of the subject matter of the third party complaint and of the persons of the third party defendants, and that the interests of justice require the claim of third party plaintiff against third party defendants to be adjudicated in this proceeding. Said motion will be based upon the minutes of the Court, the entire record in [42] this action, and the annexed points and authorities.

Dated: October 6, 1950.

/s/ RICHARD A. PERKINS,
Attorney for Third Party
Plaintiff.

[Endorsed]: Filed October 10, 1950. [43]

[Title of District Court and Cause.]

STATEMENT OF OBJECTIONS TO PRO-
POSED ORDER AND JUDGMENT DIS-
MISSING THIRD PARTY COMPLAINT

C B S Steel and Forge, a corporation, defendant and third party plaintiff, hereby states its objections to the proposed order and judgment dismissing

third party complaint which were received by the undersigned counsel at 9:00 a.m., October 5, 1950:

1. Both said proposed order and said proposed judgment would place the ground of dismissal upon a finding that the third party complaint failed to state a claim upon which relief could be granted, i.e., that it was demurrable for failure to state a cause of action. The colloquy between Court and counsel at the argument on the motion October 2nd indicated that the Court's dismissal of the third party complaint would be upon other grounds, i.e., lack of jurisdiction over the subject matter or lack of jurisdiction over the persons of the third party defendants. The proposed order and judgment as presently drawn, therefore, incorrectly reflect the Court's decision. [44]

2. It is important to the third party plaintiff and for the preservation of its rights that the order and judgment accurately reflect the grounds of the Court's decision. The third party plaintiff is presently considering the advisability of an appeal from the order and judgment of dismissal, believing that same would be erroneous. If the order and judgment are made in the form proposed, it may be difficult or impossible for third party plaintiff to present the jurisdictional point to the Reviewing Court, and the third party defendants might urge affirmance on some ground not contemplated by the Trial Court when it ordered dismissal of the third party complaint. For example, it might be urged on appeal that the third party complaint was de-

fective in some respect which could have been cured by amendment, whereas the grounds stated by the Court at the argument of the motion were such that it appeared useless to ask leave to amend.

3. Accordingly, third party plaintiff respectfully requests that if the third party complaint is to be dismissed over its objection, the order and judgment of dismissal be expressly placed upon the ground of want of jurisdiction so as to speak the truth and to permit third party plaintiff to present the question to an Appellate Court.

Dated: October 6, 1950.

/s/ RICHARD A. PERKINS,

Attorney for Third Party
Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 10, 1950. [45]

At a stated term, to wit: The September Term, A.D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday, the 14th day of November in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Peirson M. Hall,
District Judge.

[Title of Cause.]

The objections of the defendant and third-party plaintiff to the judgment are overruled, and its motion to vacate the judgment is denied. [47]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF APPEALS UNDER RULE 73 (B)

Notice is hereby given that C B S Steel and Forge, a corporation, defendant and third party plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on October 6, 1950, dismissing the third party complaint as against third parties defendant Gordon W. Shultz, Ernest Puetz, and Lee McCoy, from the order dismissing said third party complaint, and from the minute order of November 13, 1950, deny-

ing the motion of defendant and third party plaintiff to vacate said judgment of dismissal and overruling the objections of defendant and third party plaintiff to the form of the order and judgment of dismissal.

/s/ RICHARD A. PERKINS,
Attorney for Appellant.

[Endorsed]: Filed December 13, 1950. [48]

[Title of District Court and Cause.]

AFFIDAVIT FOR EXTENSION OF TIME

State of California,
County of Los Angeles—ss.

Richard A. Perkins, being sworn, says:

I am counsel for C B S Steel and Forge, a corporation, defendant, third party plaintiff, and appellant in this action. Notice of appeal from a judgment dismissing the third party complaint, etc., was filed December 13, 1950, and the time for filing the record on appeal expires January 22, 1951, pursuant to Rule 73 (g) of the Rules Governing Civil Appeals.

Counsel for appellant has been prevented from attending to the perfection of said appeal by reason of his necessary participation in emergency litigation, viz.: Mitchell, et al., vs. County of Los Angeles, et al., number 581483 in the Superior Court, Los

Angeles County. On behalf of appellant [52] affiant respectfully requests that the time for filing and docketing the record on appeal in this cause be extended to February 21, 1951.

/s/ RICHARD A. PERKINS.

Subscribed and sworn to before me this 16th day of January, 1951.

[Seal] /s/ VIRGINIA W. STOKES,
Notary Public in and for
Said County and State.

Good cause therefor appearing, the time for filing and docketing the record on appeal is hereby extended to and including February 21, 1951.

January 22, 1951.

/s/ PEIRSON M. HALL,
United States District Court
Judge.

[Endorsed]: Filed January 22, 1951. [53]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 56, inclusive, contain the original Complaint; Answer; Notice of and Motion for

Leave to Bring in Third Parties Defendant; Order Granting Leave to Bring in Third Parties Defendant; Third Party Complaint; Two Notice of and Motions to Dismiss, etc.; Order Dismissing Third Party Complaint; Judgment of Dismissal of Third Party Complaint; Notice of Motion to Vacate Order Dismissing Third Party Complaint; Statement of Objections to Proposed Order and Judgment Dismissing Third Party Complaint; Notice of Appeal; Affidavit of Service; Affidavit and Order Extending Time to Docket Appeal and Designation of Record on Appeal together with a full, true and correct copy of minute order entered November 14, 1950, which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 19th day of February, A.D. 1951.

[Seal]

EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12864. United States Court of Appeals for the Ninth Circuit. C B S Steel and Forge Company, a corporation, Appellant, vs. Gordon W. Shultz, Ernest Puetz, Lee McCoy, Howard Lane and Harold W. Gentis, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed February 20, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
Ninth Circuit

Civil Action No. 12864

C B S STEEL AND FORGE, a Corporation,
Appellant,

vs.

GORDON W. SHULTZ, ERNEST PUETZ, and
LEE MCCOY,

Appellees.

DESIGNATION OF PORTIONS OF RECORD
AND STATEMENT OF POINTS ON
WHICH APPELLANT RELIES

Appellant hereby designates the following portions of the record and proceedings to be contained in the record on appeal:

1. The complaint;
2. The answer of defendant C B S Steel and Forge;
3. The motion for leave to bring in third parties defendant;
4. The order granting leave to bring in third parties defendant;
5. The third party complaint;
6. The motion of Gordon W. Shultz and Ernest Puetz, third parties defendant, for dismissal of action and for summary judgment;
7. The notice of motion of Gordon W. Shultz and Ernest Puetz for summary judgment, etc.;
8. The motion of Lee McCoy, third party defendant, for dismissal and for summary judgment;
9. The notice of said last mentioned motion;
10. The order dismissing third party complaint;
11. The judgment of dismissal, third party complaint;
12. The notice of motion to vacate order dismissing third party complaint, etc.;
13. The statement of objections to proposed order and judgment dismissing third party complaint;
14. The minute order of November 13, 1950. overruling objections of defendant and third party plaintiff and denying its motion to vacate the judgment;

- 15 The notice of appeal;
16. The order extending time to appeal.

Clerk's certificate.

The following are the points on which appellant intends to rely on the appeal:

1. The trial court erred in dismissing the third party complaint;
2. The trial court erred in giving judgment of dismissal of the third party complaint;
3. The trial court erred in denying the motion of defendant and third party plaintiff to vacate said judgment of dismissal;
4. The trial court erred in overruling the objections of defendant and third party plaintiff to the form of the order and judgment of dismissal.

Dated: March 8, 1951.

/s/ RICHARD A. PERKINS,
Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 10, 1951.